

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TROY COSMETIC CENTER MARKETING,  
L.L.C., RENAISSANCE AMBULATORY  
CENTER, and DR. AENEAS GUINEY,

UNPUBLISHED  
June 1, 2006

Plaintiffs-Appellants,

v

No. 266909  
Oakland Circuit Court  
LC No. 2004-057165-CK

WILLIAM ABRAHAM, Individually, LINDA  
ABRAHAM, Individually, WILLIAM  
ABRAHAM AND LINDA ABRAHAM, d/b/a  
TROY COSMETIC CENTER FOR SURGERY,  
and COMPLETE MAKEOVER CENTER, L.L.C.,  
d/b/a MAKEOVER CENTER OF TROY,

Defendants,

and

TCF BANK,

Defendant-Appellee.

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Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendant TCF Bank. We affirm.

On March 26, 2004, plaintiffs filed a complaint alleging that it had entered into a business agreement with defendants, William Abraham and Linda Abraham, to purchase an ownership interest in Apres Image Choice, L.L.C., now known as Troy Cosmetic Center for Surgery, L.L.C. (TCCS). In essence, it was alleged that the Abrahams failed to provide sufficient funds to support the consideration for the agreement and breached the agreement in various ways. On August 5, 2004, plaintiffs filed a motion for leave to file a second amended complaint to add defendant bank. Plaintiffs alleged that it received documentation from defendant bank indicating that Linda Abraham had opened the bank account for TCCS by providing the federal employer identification number (EIN) for DGU Diagnostics, L.L.C. (DGU). The EIN was issued to DGU on June 11, 2001. Plaintiffs further alleged that DGU

amended its articles of incorporation to change its name to Apres Image Choice, L.L.C. (Apres), but Apres subsequently changed its name to Troy Cosmetic Center Marketing, L.L.C. It was alleged that through the “most basic due diligence,” defendant bank should have verified that the EIN provided by Linda Abraham was actually assigned to plaintiff corporation. As a result of this deficiency, it was alleged that “[p]laintiff [sic] may have tax liabilities, reporting obligations and the expense of both legal and accounting professionals to correct the [sic] created by TCF’s negligence in permitting Defendant’s [sic] misappropriation of its EIN.” On September 9, 2004, a second amended complaint<sup>1</sup> was filed, alleging negligence against defendant bank for failing “to comply with all applicable banking regulations, laws and internal policies and procedures.” Specifically, this complaint alleged that defendant bank negligently failed to determine whether Linda Abraham had the authority, if any, to utilize the EIN belonging to plaintiff and requested any damages that would arise as a result of the misuse of the EIN.

On November 30, 2004, plaintiffs filed a motion for entry of default judgment against the Abrahams and their corporate entities and for appointment of a receiver. In support of the damage award for the default judgment, plaintiffs submitted an affidavit by accountant Bruce Knapp. With regard to the account created by Linda Abraham at defendant bank, the affidavit provided:

b. TCF Account [ ]: Based on information and belief, the Defendants opened this account at TCF bank using a Federal Identification Number [ ] that belongs to an LLC owned solely by Dr. Guiney. This account was opened without his knowledge or instruction and was used by the Defendants without knowledge of the Plaintiff’s [sic]. Based on our review of the account statements for the months ended [sic] March 31, 2004 through May 31, 2004, we believe there was approximately \$1,175,000 in funds deposited into the account. Assuming those three months are representative of the following months, and that the average monthly receipts are expected to [sic] \$375,000, then the expected gross revenue deposited to the account through October 31, 2004 would be approximately \$3,000,000.

c. We are informed that Dr. Guiney has a fifty (50%) percent interest in the business generated through this entity. Based on the estimated business generated as noted above, the proceeds due and owing to Dr. Guiney is \$1,500,000.

d. Defendants have not responded to any request for the production of documents, including a request for the bank statements for this account for the months ended [sic] June 30, 2004 through October 31, 2004. These documents would be used to determine the actual amount deposited into the TCF Bank account [ ].

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<sup>1</sup> A transcript of the hearing on the motion and an order granting the motion is not contained in the lower court record. Based on the docket entries and the filing of the second amended complaint, it is apparent that the motion was granted.

e. We believe that the Internal Revenue Service could take the position that the Plaintiff shall pay income tax on up to 100% of the deposits to the businesses bank account. Additionally, the service may disallow any deductions for reasonable and ordinary business expenses, since the owner of the business entity was unaware that the funds were being deposited into the account; and the Defendants made all disbursements. Given that position, the federal income tax could be as high as 34% of the deposited funds, or approximately \$1,000,000. It would also be reasonable for the Plaintiffs to request that Defendants indemnify and hold them harmless for any IRS claim arising from this matter.

On September 14, 2005, defendant bank moved for summary disposition, alleging that it did not owe a duty to verify the accuracy of the assertion that the EIN provided by Linda Abraham applied to TCCS. It was further alleged that plaintiffs could not establish any damages as a result of any action taken by defendant bank. The account opened by Linda Abraham was a non-interest bearing checking account, and consequently, defendant bank had no reason to report information regarding the EIN to the Internal Revenue Service (IRS).<sup>2</sup>

Plaintiffs opposed the motion for summary disposition. Plaintiffs alleged that defendant bank owed a general duty of due care such that its actions would not unreasonably endanger the person or property of others. It was alleged that the deposition testimony of the bank's employees confirmed "that they were improperly trained and did not follow their own internal procedures." Plaintiffs also alleged that an expert reviewed the financial information surrounding the Abraham account, and concluded that tax liability exposure could reach \$800,000 and costs and attorney fees were expended in prosecuting this matter. Therefore, plaintiffs' claim for damages was not speculative.

After entertaining oral argument, the trial court concluded that plaintiffs had not identified a statute or common law duty owed by defendant bank. The trial court also concluded that damages, at that time, were speculative because defendant bank had not provided any information to the IRS. Plaintiffs appeal from this ruling.

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<sup>2</sup> On May 20, 2005, plaintiffs filed a motion to amend the complaint against defendant bank to raise violations of federal security and banking statutes and state consumer protection statutes. These statutory violations allegedly arose from defendant bank's failure to verify the EIN presented by Linda Abraham. On June 13, 2005, the trial court entered an order granting plaintiffs' motion to file a third amended complaint, and on June 23, 2005, the third amended complaint was filed. Defendants' motion for summary disposition sought dismissal of these newly added statutory claims, and the trial court granted the motion. On appeal, plaintiffs' statement of the questions presented does not address the dismissal of these statutory claims. Consequently, we need not address them. See *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000) (holding that an issue is waived if not raised in the statement of questions presented).

Appellate review of summary disposition decisions is de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id.* To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id.* Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Mere conclusory allegations that are devoid of detail do not satisfy the burden in opposing a motion for summary disposition. *Quinto, supra*.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty by defendant; (3) causation; and (4) damages as a result of the injury to the plaintiff. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). Duty is any obligation owed to the plaintiff to avoid negligent conduct, and whether a duty exists generally presents a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). In determining whether a legal duty is imposed, this Court must evaluate various factors such as the relationship of the parties, the foreseeability of the harm, the degree of certainty of injury, the closeness of connection between the conduct and the injury, the burden on the defendant, the moral blame attached to the conduct, the policy of preventing future harm, the burdens and consequences of imposing a duty and liability for breach, and the nature of the risk presented. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2000); *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997).

After reviewing the factors, we cannot conclude that the trial court erred in granting summary disposition in favor of defendant bank. The parties to this appeal did not have a relationship, rather plaintiffs' negligence claim is premised on defendant bank's business transaction with the Abrahams, who were also business associates of plaintiffs. Injury does not appear certain to occur when the account at issue involves a non-interest bearing checking account, and there is no evidence that defendant bank provided any information to the IRS. In this case, it is unclear whether plaintiffs suffered injury as a result of allowing the EIN to be placed on the TCCS account. Although plaintiffs provided correspondence from the IRS as evidence of damages, there is no indication on the documentation that it relates to the bank account involving the EIN and Linda Abraham. The burden imposed on defendant bank to investigate the EIN would be extremely high. A representative for defendant bank testified that although there was a database available to verify social security numbers there was not a repository for EINs. Under the circumstances, the trial court did not err in concluding that defendant bank did not owe plaintiffs a duty.<sup>3</sup>

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<sup>3</sup> We also note that plaintiffs assert that the EIN belongs to plaintiff TCCM. However, the EIN was issued to DGU Diagnostics, L.L.C. The State of Michigan Department of Consumer & (continued...)

Alternatively, the trial court also properly granted summary disposition of the negligence claim based on speculative damages. The party asserting a claim has the burden of proving damages with reasonable certainty. *Ensink v Mecosta Co General Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004). Remote, contingent or speculative damages are not permitted in a tort action. *Id.* at 524. To hold a wrongdoer liable for damages in a tort action, there must be an immediate connection between the injurious act and the consequences such that the influence of the injurious act predominates over other causes to produce the consequences. *Id.* at 524-525. In the present case, plaintiffs failed to meet their evidentiary burden to create a genuine issue of material fact regarding damages. *Quinto, supra*. The affidavit presented by plaintiffs' expert explored the possibility of damages from the use of the EIN. Furthermore, the documentation sent by the IRS regarding outstanding taxes failed to contain any reference to the bank account at issue and the allegedly improper use of the EIN.<sup>4</sup> Therefore, the trial court properly dismissed the negligence claim.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Karen M. Fort Hood  
/s/ Deborah A. Servitto

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(...continued)

Industry Services received the articles of organization for DGU and issued a state identification number. DGU apparently changed its name to Apres Image Choice, L.L.C., and William Abraham filed documentation to change the name from Apres Image Choice, L.L.C. to Troy Cosmetic Center Marketing, L.L.C. Although documentation regarding corporate name changes was submitted to the state, there is no indication that the federal EIN was changed. According to the IRS website, a business will need to acquire a new EIN when there is an ownership or structure change. Plaintiffs failed to provide evidence regarding the membership of each entity following each name change. See [www.irs.gov/businesses/small/article/0,,id+98011,00.html](http://www.irs.gov/businesses/small/article/0,,id+98011,00.html). Therefore, we must assume that plaintiff TCCM had standing to challenge the use of the EIN originally issued to DGU.

<sup>4</sup> When a motion is brought based on 2.116(C)(10), all documentary evidence then filed in the action may be considered. MCR 2.116(G)(4). The affidavit filed by the expert at the default judgment hearing indicated that plaintiffs were seeking \$1,500,000 in damages as gross revenue proceeds. Therefore, if documentation had been presented from the IRS that this bank account was involved, the IRS could be seeking to recoup taxes from plaintiffs based on their claim of the proceeds.